

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL FREDRICK CRIPPEN,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 246724

Oakland Circuit Court

LC No. 1997-152705-FH

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b), and entry without permission (illegal entry), MCL 750.115. He was sentenced to two to fifteen years' imprisonment for the CSC conviction and ninety days in jail for the illegal entry conviction. Defendant appeals as of right, and we affirm.

On August 15, 1996, the victim went to dinner with her fiancé and consumed two alcoholic beverages. The couple returned to their apartment, located on the first floor of the complex. The apartment was accessible via a front stairwell or a doorwall. The couple returned to the apartment after 9:00 p.m. and shared a marijuana cigarette. The victim fell asleep on the couch in the living room. She awoke to find a man standing over her. The man was wearing fish net stockings and tight fitting short pants. The victim could not identify the man's face because he was wearing a camouflage hood. The victim believed that the man was her fiancé, seeking to engage in sexual games. Her fiancé had camouflage clothing because he was a hunter. During some of their experimentation, the victim's fiancé had worn similar clothing, although the stockings confused her. The man proceeded to fondle the victim and eventually engaged in digital penetration. During the sexual encounter, the victim called out the name of her fiancé. The man did not respond or speak during the sexual encounter. The victim would not have engaged in any sexual acts if she had known the man's true identity. The man exited the apartment through the doorwall. The victim went to the bathroom and saw her fiancé asleep in the bedroom.

The victim realized that the man that she encountered was not her fiancé. She began screaming and told her fiancé that there was an intruder in the apartment. After police were called, the victim was unable to provide any description of the perpetrator's facial features because of the concealment of the face with the hood during the encounter. On cross-

examination, the victim acknowledged that there was no force involved, and she was not physically hurt. However, the victim testified that any participation was based on the belief that the man involved was her fiancé. The victim testified that the man involved was the same general physical stature as her fiancé. She also testified that she was not in the proper frame of mind to make an assessment of stature. The victim reported to police that, at one point during the encounter, the man became rough, causing her to push him away.

The next evening, police established surveillance of the victim's apartment, based on the belief that the perpetrator would return to the scene. Police observed defendant approach the doorwall of the victim's apartment. For approximately two minutes, police observed defendant crouched down, trying to look through the doorwall. Police arrested defendant for "window peeping." After being advised of his rights and initially denying any involvement, defendant admitted entering the victim's apartment while she was asleep, then engaging in sexual conduct with her with a cloth covering his head. Defendant was convicted as charged.

Defendant first alleges that there was insufficient evidence to support his conviction. We disagree. Challenges to the sufficiency of the evidence are reviewed de novo to determine whether, in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). With regard to the elements of third-degree CSC conduct, this Court held:

The offense of CSC III requires a showing that the defendant engaged in sexual penetration with another under certain aggravating circumstances, including sexual penetration accomplished by force or coercion. The existence of force or coercion is to be determined in light of all the circumstances, and includes, but is not limited to, acts of physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise to overcome the victim. The term "concealment" is not defined in the criminal sexual conduct statute. Unless defined in the statute, every word of the statute should be accorded its plain and ordinary meaning. If a statute does not expressly define its terms, a court may consult dictionary definitions. The [dictionary] defines "conceal" as "to hide; cover or keep from sight; to keep secret; avoid disclosing or divulging." [*People v Crippen*, 242 Mich App 278, 282-283; 617 NW2d 760 (2000) (citations omitted).]

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support the elements of third-degree CSC based on the theory of concealment or surprise. Defendant observed the victim asleep on her couch and became aroused. The doorwall of the apartment was open. The victim was asleep and unaware of the fact that she was being watched in her own home. She awoke to find defendant standing over her, engaging in sexual conduct. Defendant did not identify himself and was dressed in a manner that concealed his identity. The victim testified that her fiancé owned similar clothing to that worn by defendant. The victim was not afraid and did not resist because she believed that defendant was her fiancé. The victim testified that she would not have allowed the sexual conduct to occur if she had known the truth. On at least two occasions, the victim called out the name of her fiancé during the encounter. Where defendant was able to engage the victim in digital penetration because he

hid his true identity from the victim, there was sufficient evidence to support the third-degree CSC conviction. *Randolph, supra; Crippen, supra.*

Defendant next alleges that he was denied his right to a speedy trial. We disagree. A defendant has a constitutional and statutory right to a speedy trial. US Const, Ams VI and XIV; Const 1963, art 1, § 20; MCL 768.1. Four factors are balanced to determine whether a defendant has been denied the right to a speedy trial: (1) the length of the delay ; (2) the reasons for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) prejudice to the defendant as a result of the delay. *People v Holtzer*, 255 Mich App 478, 490-491; 660 NW2d 405 (2003). Prejudice is presumed if the period of delay exceeds eighteen months where the delay is not attributable to the defendant. *Id.* Scheduling delays and delays inherent in the court system, although technically attributable to the prosecution, are to be given a “neutral tint” and given only minimal weight when determining whether a defendant was denied a speedy trial. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997). Additionally, delays inherent in the case because of the complexity of the matter and the orderly resolution thereof are also given a neutral tint and assigned only minimal weight. *People v Rosengren*, 159 Mich App 492, 507; 407 NW2d 391 (1987). “A formal charge against, or restraint of, the accused is necessary to call the right to speedy trial into play.” *Id.* at 506 n 16, citing *United States v Marion*, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971). Where the period at issue is presumptively prejudicial, an inquiry into the other balancing factors is triggered. *Gilmore, supra* at 459.

When examining the prejudice requirement, there are two types of prejudice, prejudice to the person and prejudice to the defense. *Gilmore, supra*, at 461-462. Prejudice to the person does not occur where the defendant was not incarcerated during the period between the time of arrest and trial. *Id.* at 462. Claims of prejudice to the defense are not satisfied by general allegations of anxiety, financial burdens, and the potential for faded memories. *Id.* at 462.

In *Holtzer, supra*, this Court denied the defense motion to dismiss premised on the denial of the right to a speedy trial. In that case, a period of incarceration while awaiting trial was not an issue because the defendant was incarcerated for an unrelated offense. Additionally, there was no indication of lost evidence as a result of the delay. Rather, much of the delay was related to scientific testing. *Id.* at 494-495.

In the present case, the incident occurred in August 1996. Following the preliminary examination, in April 1997, the district court refused to bind over on the offenses charged by the prosecutor. The district court decision was reversed by the circuit court in September 1997. This Court denied the application for leave to appeal, but the Supreme Court ordered the matter to be heard as on leave granted. This Court issued its decision in August 2000. *Crippen, supra*. An application for leave to appeal the opinion to the Supreme Court was denied in February 2001. *People v Crippen*, 463 Mich 974 (2001). In August 2002, the district court bound the case over for trial on third-degree CSC and illegal entry. Defendant was arraigned in circuit court in

August 2002. After the motion to dismiss, asserting the denial of the right to a speedy trial, was denied by the trial court in September 2002, the trial was held in November 2002.¹

When examining the date charges were filed against the date of trial, a six-year gap occurred. However, the majority of the delay occurred because of the appellate process through the circuit court, Court of Appeals, and Supreme Court. Thus, the bulk of the period of delay was due to the complexity of the issue and the resolution of the issue through the appeal process. This delay is given minimal weight. A twenty-one month period of delay occurred between the exhaustion of appellate remedies before the Supreme Court and the ultimate trial date. Although there is a presumption of prejudice, when balanced with the other factors, we cannot conclude that the trial court's denial of the motion for a speedy trial was clearly erroneous. *Gilmore, supra* at 459. Defendant was not incarcerated while the complexity of the litigation was addressed during the appeal process. *Holtzer, supra*. Defendant's general allegations of anxiety and his progression as an individual do not constitute sufficient evidence of prejudice.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Karen M. Fort Hood

¹ At the hearing regarding the motion for speedy trial, the trial prosecutor did not fault the circuit court for the delay. Rather, the trial prosecutor explained: "What happened was the Supreme Court issued a ruling, it should have been gone [sic] back to the District Court, and there was a delay from February of 2001 until this case was finally arraigned in Circuit Court." It is unclear if this period is attributed to a delay in the district court or a delay by the prosecution. Periods of unexplained delay are attributable to the prosecution. *People v Patterson*, 170 Mich App 162, 167; 427 NW2d 601 (1998).